

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP JAMES TOWNSEND,

Defendant-Appellant.

UNPUBLISHED

December 13, 1996

No. 173432

Ingham County

LC No. 93-066509-FC

Before: Jansen, P. J., and Reilly and E. Sosnick,* JJ

PER CURIAM.

Defendant was convicted by a jury of aggravated assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He pleaded guilty to habitual offender fourth, MCL 769.12; MSA 28.1084. Defendant was sentenced to concurrent terms of twenty-five to fifty years for the assault and habitual offender convictions and to a consecutive two-year prison term for felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant, who allegedly was a member of a gang called the Vice Lords, and two or three companions followed the complainant and his friends through an alley to the complainant's car. After the complainant and his friends got into the car, defendant and his group approached and demanded that the complainant get out of the car. The complainant did not comply. Defendant and another person with defendant's group pulled out guns and began shooting. The complainant was shot in the left arm and right leg. One of the complainant's companions testified that he saw that defendant pointed his gun at the driver's side window and fired at least three times.

Defendant first argues that he was denied a fair trial due to the introduction of evidence linking defendant to a gang. We disagree. This evidence was proffered to help establish defendant's motive for the assault. The evidence indicated that defendant told a witness that he was in the Vice Lords and he was seen making a hand signal associated with the Vice Lords. The complainant testified that he was

* Circuit judge, sitting on the Court of Appeals by assignment.

aware that the Vice Lords were angry or upset with him and that he thought the Vice Lords were out to shoot him. Unlike *People v Wells*, 102 Mich App 122, 129; 302 NW2d 196 (1980), a case on which defendant relies, this evidence was adequate to establish a causal link between defendant's gang membership and the assault. Therefore, the admission of the gang testimony was not an abuse of the trial court's discretion. In any event, even if the evidence should not have been admitted, the evidence against defendant was overwhelming, and any error would have been deemed harmless.

Defendant next argues that the trial court improperly allowed the court clerk to testify in rebuttal that, while escorting defendant to the courtroom, the clerk observed defendant make a gesture with his hand. The gesture was the same as that described by a witness as being associated with the Vice Lords. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecution case in chief, but, rather whether the evidence is properly responsive to evidence introduced by the defendant." *Id.* at 399. In this case, the testimony related to defendant's alleged gang participation, which defendant had denied when he testified. The evidence was responsive to evidence introduced by defendant, and contrary to defendant's argument, the probative value was not substantially outweighed by the danger of unfair prejudice. The trial court did not clearly abuse its discretion. In any event, the overwhelming weight of the evidence indicated that defendant would have been convicted without the admission of this evidence. Therefore, the error, if any, was harmless.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick